Cas. No. 357, *Hayes* v. *Wickwire*, 11 Fed. Cas. No. 6262. The court below relied almost entirely upon the events of the night of January 19th, and the early morning of January 20th to support its decision that petitioner intended "not to return to the ship's services." However, petitioner's statements and actions of that night must be weighed against the total record including his actions after he had had an opportunity to sleep on his hasty actions and receive needed medical attention for the beating to which he had been subjected. Indeed, if he had been drinking, he may have been incapable of entertaining a premeditated and deliberate purpose to leave his ship permanently. When viewed in the larger perspective, it is clear that petitioner had no permanent intent to desert.

On the basis of all the evidence during this period, petitioner respectfully submits that his leaving the ship under the circumstances he did, viz. fight, fear for personal safety, clothing left aboard, call to Engineer, and timely effort to return, proves he did not desert his ship as that term, is defined in the employing agency's own rules. At most, he was absent without leave. However, he was neither charged with nor punished for that offense. Thus, his dismissal was procedurally defective and unlawful, under Section 14 of the Veterans' Preference Act, 5 U.S.C. 863; *McGuire* v. *U. S.* Court of Claims, No. 383-54, decided February 11, 1959. Instead, the employing agency undertook to charge him with desertion and impose upon him the severe penalty of dismissal and forfeiture of pay and personal belongings. In *The Cripple Creek*, 52 F. Supp. 710, the court found certain seamen guilty of absence without leave, but not guilty of desertion:

> "To constitute the offense of desertion * * * it is essential that there must be an intention not to return, *animo non revertendi* * * * It seems to me from the careful examination of the record that it cannot be stated that these libelants deserted the vessel "Cripple Creek" in the sense that they intended to *cut off completely all relationship with the vessel.* However, I feel certain they were *absent without leave* * * *". (Emphasis supplied).

As set forth in the *McGuire* case, supra, plaintiff cannot be lawfully discharged under Sec. 14 of the Veterans' Preference Act for desertion, if the evidence only supports a charge of absent without leave.

CONCLUSION

Wherefore, the premises considered, petitioner prays that his petition for a writ of certiorari be granted.

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Of Counsel

May 2, 1960

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 438-58

(Decided February 3, 1960).

CONSTANTINE GUINESS

v.

THE UNITED STATES

Mr. Carl L. Shipley for plaintiff. *Messrs. Shipley, Akerman & Pickett*, and *Samuel Resincoff* were on the brief.

Mr. Earl L. Huntington, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant. *Mr. George S. Leonard* was on the brief.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before the court on defendant's motion and plaintiff's cross-motion for summary judgment.

On May 31, 1956, plaintiff, a veteran preference eligible in the classified civil service, was discharged from his position in the Military Sea Transportation Service, with forfeiture of all pay and allowances, including accrued leave from January 16, 1956.[1] The charge against plaintiff was that he

[1] This was in accordance with R.S. § 4596, 30 Stat. 760 (1898), as amended, 53 Stat. 1147 (1939), 46 U.S.C. § 701 (1952), which provides, in pertinent part:

> Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:
>
> First. For desertion, by forfeiture of all . . . any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

had deserted his ship, the USNS Short Splice on January 20, 1956, while it was docked at the United States Naval Operating Base, Bermuda. After a review on the merits, both the Military Sea Transportation Service (MSTS) and the Civil Service Commission, to which plaintiff appealed, sustained the charge.

Plaintiff now sues in this court for the salary he would have received if he had not been discharged, claiming that the actions of the employing agency and the Civil Service Commission were arbitrary and capricious or their decisions were so erroneous as to imply bad faith, since, it is alleged, there was no substantial evidence before either of them to sustain the charge of desertion.

The record before this court contains all the evidence before the Civil Service Commission and the Military Sea Transportation Service. The relevant facts of the case may be briefly stated as follows: Plaintiff was employed as the First Assistant Engineer on the USNS Short Splice. On the evening of January 19, 1956, while in the Chief Petty Officers' Club at the Bermuda Naval Station, plaintiff and one Benbow who was a wiper on the Short Splice and one of plaintiff's subordinate employees, got into an altercation, during which Benbow hit plaintiff on the side of the head. Immediately thereafter, Benbow left the Club. Plaintiff followed after him, but was unable to overtake him. Plaintiff then returned to the ship.

When Benbow returned to the ship about 1:00 a.m. plaintiff sought him out and found him in his room aboard the Short Splice. A second disagreement took place, during which Benbow struck plaintiff in the face, while plaintiff's arms were being held by the Second Mate and others in an attempt to stop the fight. Eventually, plaintiff was pushed and crowded to his cabin by the Chief Mate and the Second Mate.

In his affidavit made on January 23, 1956 plaintiff reports the following colloquy which took place at this time between him and the First and Second Mates:

> • • • I told them both that if they think they can run the Engine Department I would pack my gear and get off. The Second Mate told me he did not care what I did, but he would not let me go to the Wiper's room. I told them at least three times, but they would not let me alone; consequently I started packing. • • • The mates were so sure I would not do such a foolish thing that no one tried to stop me from leaving. • • •

Duprey, the Chief Mate and a friend of plaintiff's testified concerning this incident:

> I told Mr. Guiness to calm down & stop making a fool of himself. He said that he didn't care & was getting off the ship. I told him that he would be a deserter & make it bad for everyone. He said that he wasn't taking orders from any mates. He asked for a suitcase. With the idea that the gesture might calm him down, I let him have one of my suitcases. He packed his gear. I told him to sleep on his decision before leaving the ship. I left him in his room at about 0200 to let him think it out. All told, I was trying to talk him into acting sensibly from about 2330 to 0200.

After leaving the ship, plaintiff went to a nearby hotel. After getting a room, he telephoned the Chief Engineer. Plaintiff gives the following report of this conversation in his affidavit of January 23:

> I called the Chief Engineer to inform him that the captain wanted the ballast tanks filled in the morning and that I did not want to sail on a ship where a Wiper can punch a First Assistant Engineer. He told me I would get into trouble, that I was acting too hastily, and the least I should do is remain aboard until the ship arrived in New York.

The Chief Engineer relates this conversation as follows:

> 1. On 20 January 1956 at about 0230 1st Asst. Engr. C. Guiness telephoned me on board ship. I was just returning to the ship from liberty.
>
> 2. Mr. Guiness informed me that the Master wanted the ballast pumped in in the morning. He told me that he was in some fight with the Wiper & had gotten a black eye. He said, "I've got my bags with me & am staying up here at the hotel." He said, "I'm not coming back." I said, "After 14 years of service, you'd be a fool to quit that way." I talked to him for about 20 minutes telling him over and over again to come back to the ship. He refused to come back. He said that he had already gotten his reservation on the 0900 plane to N. Y. I told him that he could get his money back & sail with the ship.

The next morning, January 20, 1956, plaintiff awoke at 9:00 o'clock and, after seeking medical care for his swollen eye, took an afternoon plane to New York. The Short Splice sailed that morning at 10:00 o'clock for Norfolk. Soon after his arrival in New York plaintiff reported the foregoing events to officials at the Military Sea Transportation Service headquarters in New York.

On February 3, 1956, he was charged with desertion, and later, on May 31, 1956, he was dismissed from the service and his pay and personal effects left on board were forfeited.

In plaintiff's contract of employment he agreed to be bound by the Civilian Marine Personnel Instructions and all duly authorized regulations. Section 6 of Civilian Marine Personnel Instruction No. 45, which is the regulation of the employing agency on which the charges were based, defines desertion as "the quitting of a ship and her services without leave and with the intent not again to return to the ship's duties." Paragraph 6-2 further requires that "the intent to desert be established by a preponderance of the evidence." Plaintiff bases his argument solely on the ground

that the evidence did not establish the necessary intent to sustain the charge of desertion. He says this is true because there is evidence in the record that when he left the ship he left certain items of clothing behind, and, secondly, that as soon as possible after his arrival in New York he reported to the agency headquarters, related what had taken place, and asked their advice on what to do. However, irrespective of this, we have in evidence plaintiff's own affidavit and testimony that he told the Chief Engineer that he was quitting the ship, and his statement to the First and Second Mates that he was leaving the ship, and the further fact that he packed a suitcase with at least some of his personal effects, and left the ship with them. His affidavit is corroborated and elaborated by the First Mate and Chief Engineer. We also have the further fact that when plaintiff awoke the next morning he made no effort to rejoin his ship, although it did not leave until an hour later.

Plaintiff says when he arrived in New York he asked permission to rejoin his ship in Norfolk, but none of the five officials of the service in New York have any recollection of such a request having been made.

In the light of all this evidence, it is clear that the employing agency was not arbitrary or capricious in determining that plainff did have the intent to desert his ship.

We call attention to the fact that plaintiff was not charged with deserting the service, but with deserting his ship. We quote a passage from the opinion of the Supreme Court in *Robertson* v. *Baldwin*, 165 U.S. 275, 282-283:

> From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as

Molloy forcibly expresses it, "to rot in her neglected brine." Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself.

It is not our function to substitute our judgment for that of the employing agency or the Civil Service Commission. Our review is limited to the sole question of whether their action was reasonable in the light of all the evidence. *Blackmon* v. *United States*, 128 C. Cls. 288; *Bayly* v. *United States*, 99 C. Cls. 598. We have no doubt that it was entirely reasonable. Plaintiff, of course, acted in anger, but even after he had "slept over it," he still made no effort to rejoin his ship, but abandoned it and left it to get to Norfolk as best it could, without the services of one of the most important officers in charge of the operation of a ship, to wit, the First Assistant Engineer.

Plaintiff's motion is denied. Defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

It is so ordered.

BARKSDALE, *District Judge*, sitting by designation; LARAMORE, *Judge*, and MADDEN, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I am unable to agree with the conclusion reached by the majority.

When the pleadings and attached exhibits are considered, the record wholly fails to justify the extreme penalty that was assessed against the plaintiff.

Concededly, plaintiff was not free from blame and should have been subjected to some sort of disciplinary measure but the record does not justify sustaining the charge of desertion and the forfeiture of all pay and privileges against a gallant sailor who had an unusually fine war

record. He had been given numerous medals and citations for outstanding combat duty during World War II. These included *inter alia*, a presidential unit citation, sub combat pin—7 stars, Navy unit citation, and a bronze star medal conferred by the President of the United States for courage and steadfast devotion in the fulfillment of several perilous missions.

Plaintiff, while in the employment of the Military Sea Transportation Service, Department of Navy, as first assistant engineer on the USNS Short Splice, was twice assaulted by one of the subordinates serving under him; the second time, while a third member of the crew was holding his arms. This latter assault caused rather serious injuries.

The first assault occurred while both parties were on leave; the second at about 1:00 a.m. while on the ship. At about 2:00 a.m. the same night plaintiff packed a bag and left the ship, staying at the Eagle's Nest Hotel. Plaintiff called the chief engineer at 2:30 a.m. to advise him that the Master wanted the ballast tanks filled the following morning. The morning following the incident, January 20, 1956, plaintiff went to the Bermuda Medical Center where he was referred to the Bermuda Hospital for treatment of his injuries.

By this time the ship had sailed. Plaintiff had left most of his clothing on board and his engineer's license was still in its place on the ship. Plaintiff caught a plane the same day for New York, the ship's home port, and immediately reported to the Military Sea Transportation Service, the agency which had employed him. He asked the privilege of rejoining the ship at Norfolk and was told that he would not be permitted to do so. Plaintiff was dismissed from the service on the ground of desertion, thus making a permanent black mark against his record.

I do not think the undisputed facts justify a verdict of desertion. In a recent decision by the Supreme Court,

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474, 487 (1951), there is a holding to the effect that the fact that there is evidence, considered of and by itself, to support the administrative decision is not sufficient where there is opposing evidence so substantial in character as to detract from its weight and render it less than substantial on the record as a whole.

When this entire record is considered I do not believe, in the light of this interpretation, there is substantial evidence to justify the conclusion that was reached by the officials.

The charge of desertion is a very serious one. I am unable to escape the conclusion that the action was taken on sudden impulse with severe provocation. The fact that plaintiff left most of his clothing aboard ship and left his engineer's license in place on the ship does not comport with the idea of desertion.

It is true that plaintiff should not have left the ship. It is also true that a subordinate should not assault someone under whom he is serving. The latter action in the matter of discipline is more important than leaving the ship for just one night.

In order to remove the cloud from the name and reputation of a sailor with a magnificant war record, who had been covered with medals and citations, I would hold that there is not substantial evidence to sustain the finding of desertion and the forfeiture of all pay and allowances.

In order to balance the record and remove a manifest injustice, I would grant the plaintiff a restoration of his pay for a six months' period. This would have the effect of removing a blemish that in my judgment has unjustifiably been placed against a veteran with an outstanding war record.